

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARTIN V. LOBATO,

Plaintiff,

v.

BANK OF AMERICA FKA COUNTRYWIDE,
CITIBANK, N.A., AMERICA'S WHOLESALE
LENDER, CITIBANK (WEST), FSB,
RECONTRUST COMPANY, N.A., THE BANK
OF NEW YORK, AS TRUSTEE FOR THE
CERTIFICATE HOLDERS WALT, INC.,
ALTERNATIVE LOAN TRUST 2006-9TI
MORTGAGE ELECTRONIC REGISTRATION
SYSTEM, INC., NETWORK FINANCIAL
SERVICES MORTGAGE, TUNG T. NGUYEN,
GLENN ARTHUR MENDELL, DEREK JOHN
MILLER, SERGIO ANGELES, and DOES
1-20, inclusive,

Defendants.

No. C 10-00106 WHA

**ORDER GRANTING
MOTION TO DISMISS,
AND DENYING MOTION
FOR SANCTIONS AND
MOTION TO STRIKE
AS MOOT**

INTRODUCTION

This action involves eight state law claims relating to plaintiff's home loan. Defendants move for dismissal and sanctions. Plaintiff's first amended complaint dropped the only federal claims from this proceeding. There is no longer a basis for federal jurisdiction in this matter and this order declines to assert supplemental jurisdiction over plaintiff's remaining state law claims. Defendants' motion to dismiss is consequently **GRANTED**.

The undersigned has a strong suspicion that plaintiff's counsel has misused the court system in order to bilk struggling homeowners of attorney's fees. The sworn record, however,

1 is too thin to support a finding of subjective bad faith. Accordingly, defendants' motion for
2 sanctions is **DENIED**. Counsel for plaintiff's motion to strike is **DENIED** as moot.

3 **STATEMENT**

4 This action challenges numerous defendants associated with a home loan. Plaintiff
5 homeowner received a notice of default on his mortgage and foreclosure was initiated soon
6 thereafter. Plaintiff's original complaint asserted California state law claims for negligence,
7 fraud, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith
8 and fair dealing, violation of the California Business & Professions Code, violation of the
9 Rosenthal Fair Credit Reporting Act, and wrongful foreclosure. The original complaint also
10 included claims for violations of the Truth in Lending Act, 15 U.S.C. 1601, *et seq.*, and the Real
11 Estate Settlement Procedures Act, 12 U.S.C. 2605, *et seq.*, which established federal question
12 jurisdiction for this proceeding.

13 Defendants Bank of America, N.A., Countrywide Home Loans, Inc., Recontrust
14 Company, N.A., Mortgage Electronic Registration Systems, Inc., and the Bank of New York
15 noticed a motion to dismiss. In response, plaintiff's counsel filed a statement of non-opposition
16 concurrently with a request that the district court decline to exercise supplemental jurisdiction
17 and dismiss the remaining state law claims without prejudice, or alternatively to grant plaintiff
18 leave to amend. Plaintiff also filed a parallel first amended complaint "as a matter of course"
19 per Rule 15(a)(1) omitting the originally pled federal claims. On May 3, an order dismissed the
20 federal claims. Plaintiff's state law claims were not dismissed, however, due to the filing of the
21 first amended complaint which continued to assert those claims.

22 In response, defendants noticed the instant motions to dismiss plaintiff's remaining state
23 law claims and for sanctions in the form of attorney's fees pursuant to 28 U.S.C. 1927.
24 Defendants contend that plaintiff's counsel has unreasonably and vexatiously increased the cost
25 of litigation in these proceedings by filing the first amended complaint without any federal
26 claims, suggesting that she should have filed a voluntary dismissal instead. Defendants further
27 contend that plaintiff's counsel has employed a similar pattern of filings in 114 other substantially
28 similar lawsuits.

1 Plaintiff's counsel, Sharon Lapin, responds to defendants' motion for sanctions in a
2 memorandum of opposition, asserting that she has not acted in bad faith in these proceedings and
3 that the papers filed herein have not been filed in order to vex or harass defendants. In the same
4 memorandum, Attorney Lapin suggests that this Court can no longer exercise supplemental
5 jurisdiction over plaintiff's remaining state law claims, since all of plaintiff's federal claims were
6 dismissed on May 3.

7 On the eve of the hearing, defendants filed an unsolicited supplemental declaration in
8 support of their motion for sanctions. Attorney Lapin was given an opportunity to respond, which
9 she did, reiterating her opposition to sanctions and moving to strike certain elements of the
10 supplemental declaration.

11 ANALYSIS

12 1. MOTION TO DISMISS.

13 A district court may decline to exercise supplemental jurisdiction over a state-law claim
14 if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. 1367(c)(3).
15 While the exercise of such discretion may not be taken lightly, the Ninth Circuit has determined
16 that "in the usual case in which all federal-law claims are eliminated before trial, the balance of
17 factors . . . will point toward declining to exercise jurisdiction over the remaining state-law
18 claims." *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (internal citation
19 omitted).

20 So too here. Plaintiff filed a statement of non-opposition to defendants' motion to dismiss
21 and submitted a request to have his federal claims dismissed. Those claims were consequently
22 dismissed in the May 3 order. Following the statement of non-opposition, plaintiff filed a first
23 amended complaint in which his originally pled federal claims were omitted. Plaintiff does not
24 oppose the dismissal of his remaining state-law claims. Accordingly, all of plaintiff's remaining
25 claims are dismissed.

26 2. MOTION FOR SANCTIONS.

27 Section 1927 provides, in relevant part: "Any attorney . . . who so multiplies the
28 proceedings in any case unreasonably and vexatiously may be required by the court to satisfy

1 personally the excess costs, and attorney's fees reasonably incurred because of such conduct."
2 Sanctions pursuant to Section 1927 "must be supported by a finding of subjective bad faith."
3 *In re Keegan Management Co.*, 78 F.3d 431, 436 (9th Cir. 1996) (internal citations omitted).
4 The Ninth Circuit has elaborated on this point, that an attorney's bad faith is evaluated under a
5 subjective standard, and has held that an attorney's "knowing or reckless conduct meets [that]
6 standard." *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir.
7 2000) (internal citations omitted).

8 The undersigned judge strongly suspects that Attorney Lapin has misused the court system
9 for the purpose of merely putting on a show of litigating on behalf of distressed clients in order to
10 collect fees from them, all to the harassment of the defendants. Suspicions are not sufficient to
11 warrant imposition of Section 1927 sanctions, however, and the sworn record here is too thin to
12 support a finding that subjective bad faith has motivated Attorney Lapin's conduct in this
13 proceeding.

14 In their motion for sanctions, defendants fail to cite to a single authority in support of their
15 request, save for Section 1927 itself. Defendants do assert some relevant case law in their reply
16 to Attorney Lapin's opposition, though only in order to correct what they believed to be the
17 inaccurate assertions of governing law proffered by Attorney Lapin. Critically, defendants do
18 not demonstrate that there is any connection between Attorney Lapin's conduct and the standard
19 for imposing sanctions; instead of explaining *why* Attorney Lapin's conduct is sanctionable,
20 defendants merely state *what* Attorney Lapin did. In this proceeding, what Attorney Lapin did,
21 was to file a first amended complaint where a voluntary dismissal would arguably have been more
22 appropriate.

23 Defendants' declarations are similarly empty. In the first declaration, the undersigned
24 was informed that Attorney Lapin (1) was a contract attorney for an organization run by James
25 Sandison; (2) has stated that she doesn't keep records in the cases that she files; and (3) often
26 doesn't speak with her clients. Much more ink was devoted to list their billable time spent
27 defending this suit. The supplemental declaration goes in another direction entirely, noting
28 that Mr. Sandison's organization is being investigated by the California State Bar, and that

Mr. Sandison himself should be sanctioned. Section 1927 sanctions are not imposed because of state bar investigations or because an attorney says that she often does not meet with her clients. Section 1927 sanctions are imposed because a court finds subjective bad faith in the conduct of an attorney appearing before it. Defendants fail to make any arguments supporting such a finding.

What a shame. This suit has brought no real help to a homeowner struggling with foreclosure during one of the worst economic crises in decades. The same is likely true for the 114 other homeowners whose complaints have been filed by Attorney Lapin since August of 2009. If defendants' counsel wanted sanctions (which possibly they actually deserve), they should have dotted their i's and crossed their t's, *i.e.*, prepared a thorough motion rather than hope that the Court would do their work for them. Next time perhaps they will do a proper job, but this case is over. Accordingly, defendants' motion for sanctions is denied.

3. MOTION TO STRIKE.


In her response to the supplemental declaration in support of sanctions, Attorney Lapin moves to strike certain elements of the declaration as hearsay. This order, however, denies defendants' motion for sanctions and does not rely on the supplemental declaration. The motion to strike is therefore moot and denied.

CONCLUSION

This order declines to assert supplemental jurisdiction over plaintiff's remaining claims and defendants' motion to dismiss plaintiff's remaining claims is **GRANTED**. Defendants' motion for sanctions is **DENIED**. Plaintiff's counsel's motion to strike is **DENIED** as moot. **THE CLERK SHALL CLOSE THE FILE.**

IT IS SO ORDERED.

Dated: July 12, 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE